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In the Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1721.

UNITED STATES OF AMERICA,
PETITIONER,

v.

JOSEPH A. CHADWICK ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief of Respondents in Opposition.

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Questions Presented.

Whether this Court should grant certiorari on an issue which was never squarely presented by the parties or directly ruled upon by the courts below, and which is framed in the context of a confused and fragmented record?

Whether the warrant requirement should be abolished for federal searches of luggage believed to contain contraband when the search-incident exception does not apply and no exigent circumstances compel swift police action?

Statement of the Case.

Prior Proceedings.

Defendants-respondents Chadwick, Machado and Leary were arrested on May 10, 1973, and were subsequently charged on November 2, 1973, with possession of marijuana with intent to distribute and conspiracy in violation of 21 U.S.C. §§ 841(a)(1) and 846. Prior to trial, respondents challenged the validity of Chadwick's arrest as lacking in probable cause and moved to suppress the fruits of a warrantless search of certain luggage (a large footlocker and two small suitcases), a body search of Chadwick's person and certain remarks made by Chadwick in the immediate aftermath of his arrest.

After an evidentiary hearing held on September 5, 1974, the district court made extensive findings of fact favorable to respondents on all issues and suppressed all of the challenged evidence (Pet. App. 32a-51a). The government then moved for reconsideration, and a second evidentiary hearing was held on March 6, 1975. The result of the reconsideration was that the district court amplified its previous rulings and reaffirmed its decision to suppress (*Id.*, 52a-63a). The government appealed and on March 29, 1976, the court of appeals rendered a decision upholding all the determinations of the district court on all issues[1] (Pet. App. 1a-31a).

[1] The specific bases for the decisions of both courts below to suppress the evidence seized from the warrantless search of the footlocker and of the two suitcases are discussed below at pp. 6-8. As to Chadwick personally, the court of appeals affirmed the district court's finding that there was "insufficient cause to justify Chadwick's arrest" and therefore "his subsequent statements and all evidence seized during the post-arrest search of his person [must be] suppressed" (Pet. App. 43a-44a; see *id.*, 26a-27a).

The government now seeks review on certiorari, not of that entire decision, but of one issue only. Passing over the rulings of both courts below that Chadwick's arrest was illegal, that his statements and any evidence seized from his person must be suppressed and that the warrantless search of the two small suitcases was invalid, the government splits off for challenge only the decision to suppress the evidence seized from the large footlocker. Apart from the confusion, which will be more fully detailed below, resulting from the government's decision to seek certiorari with respect to only one aspect of the luggage search and not the other, the government's decision to accept the ruling that Chadwick was illegally arrested creates confusion as to whether review of the footlocker search would be applicable to Chadwick at all.

Pertinent Findings of Fact With Respect to the Luggage Searches.

Both opinions of the district court (Pet. App. 32a-51a, 52a-63a) and the opinion of the court of appeals (*Id.*, 1a-32a) contain extensive findings of fact which fairly summarize the evidence adduced at the two hearings. The key findings pertinent to the luggage searches[2] are these:

[2] Although the government seeks certiorari only with respect to the footlocker search and not with respect to the search of the two suitcases, certain facts pertaining to the suitcases and their relationship to the footlocker are relevant to the question of whether or not the writ of certiorari should be granted, and so the facts surrounding both luggage searches will be reviewed together.

On May 8, 1973, federal agents in Boston received reliable information from the Office for Drug Abuse Law Enforcement (ODALE) in San Diego, California, that one Machado, who fit a profile used to spot drug traffickers, had shipped an old brown trunk or footlocker, weighing almost 200 pounds, as accompanied baggage on an Amtrak train to Boston. Based on Machado's profile, the fact that the footlocker was leaking talcum powder (a substance known to be used to mask the odor of marijuana) and the footlocker's "unusual weight for its size," it was suspected that the footlocker contained marijuana (Pet. App. 2a-3a, 34a).

The train was due to arrive at South Station, Boston, three days later, at 7:50 p.m. on May 10th. During those next few days, May 8, 9 and 10, the Boston agents continued investigating and readied themselves for the arrival of Machado and his traveling companion (a woman later identified as Leary).[3] ODALE determined that "the suspicion was sufficient to justify an expenditure of men and energy at South Station" and accordingly six law enforcement officers, as well as a "detector dog" trained to "alert" to marijuana and its handler, were gathered at the station an hour before the train's scheduled arrival. No advance efforts were made, however, to seek search or arrest warrants (Pet. App. 3a, 5a).

After the train's hour-late arrival, the agents identified a debarking passenger fitting Machado's description and observed him and Leary "take possession of an old brown footlocker and two suitcases" (Pet. App. 35a). Machado and Leary took the footlocker from the baggage cart which had been used to transport the 200-pound item from the train to

[3] Apart from communications confirming Machado and Leary's continued presence on the train, when the train passed through New Haven, Connecticut, several hours prior to its Boston arrival, Amtrak officials verified that the footlocker was still on board (Pet. App. 3a, 34a).

the station area, placed it on the floor and sat down upon it; "the couple also had with them [the] two suitcases" (*Id.*, 3a).[4]

Shortly thereafter, Chadwick arrived and "Machado and Leary engaged a redcap who physically transported the footlocker out to the car" which Chadwick had brought to the station (Pet. App. 4a; see *id.*, 38a). Leary, taking one of the two suitcases with her, entered the front passenger compartment of the parked automobile (*Id.*, 4a, 53a). The redcap, with the help of Machado and Chadwick, loaded the footlocker into the trunk of the car and "the other suitcase was placed in the automobile trunk with the footlocker" (Pet. App. 53a; see *id.*, 4a).

Then, "before the trunk lid was closed or the car engine started, the federal agents closed in and arrested the trio" (Pet. App. 5a). The respondents were immediately frisked, handcuffed and placed into government vehicles and the agents took possession of the automobile and the luggage. No guns or weapons were found; no accomplices were suspected or believed to be in the area; the footlocker was observed to be locked with two different locks (a padlock over the regular trunk latch); and immediately after the arrest the keys were taken from Machado's person (*Id.*, 5a, 7a, 35a-36a, 50a). As the government conceded in testimony, the luggage was, from the moment of arrest, under the agents' "control at all times" (*Id.*, 5a; see 35a-36a, 50a).

The footlocker and two suitcases were taken to the ODALE office. No efforts were made to secure a search warrant, but approximately an hour and a half later the luggage was opened — the footlocker by key, the suitcases by breaking the locks. Each piece of luggage was found to contain marijuana (Pet. App. 7a-8a, 36a, 53a).

[4] The agents confirmed their suspicions by having the detector dog go to the footlocker and observing its "alert" response; the agents did not have the dog sniff the suitcases (Pet. App. 4a, 35a).

The Government's Shifting Position with Respect to the Luggage Searches.

At each stage of this case — the hearing on the motion to suppress, the reconsideration of that motion, the appeal, and now the petition for certiorari — the government has taken entirely different positions with respect to the luggage searches. Accordingly, at each stage, the court involved has been asked by the government to answer a *different* question.

Stage 1: In its original opposition to respondents' motion to suppress, the government took a position which is wholly at variance with its stance before this Court now. First of all, it made no legal distinction between the footlocker, on the one hand, and the suitcases, on the other, and relied on *the same theory* to justify the warrantless searches of each (Pet. App. 33a, n. 1). Secondly, the theory that it relied upon was "exclusively" the "automobile exception"; it argued that because the luggage was placed in a parked automobile — the footlocker and one suitcase in the trunk, the other suitcase in the passenger compartment — before the seizure, the "automobile exception" immunized the agents from their Fourth Amendment duties (*Id.*, 9a, 46a, 51a). The district court, finding that "the automobile was nothing more than a platform or resting place for the [luggage]" (*Id.*, 48a), and that the luggage "was not in imminent or even potential danger of being destroyed or spirited away" (*Id.*, 50a), rejected the government's proffered excuse for its neglect to obtain a warrant[5] (*Id.*, 48a-49a). The district court also examined the facts to determine whether any exigent circumstances were present to justify application of the automobile

[5] Although the automobile exception was not pressed by the government on appeal, the court of appeals did review — and affirmed — the district court's ruling on this issue (Pet. App. 9a-10a).

or any other exception; it concluded that no such exigency existed and that none of the other exceptions to the warrant requirement were applicable (*Id.*, 50a-51a).

Stage 2: In response to its defeat, the government petitioned the district court for reconsideration on an entirely new set of theories. It separated the question of the suitcases from that of the footlocker and argued that, as to the footlocker, the search was justified as one incident to arrest (*Id.*, 10a, 54a), while, as to the suitcases, the "breaking open" was not really a "search" at all but was done merely to "inventory" their contents (*Id.*, 20a, 57a). The court rejected both theories: the footlocker, it found, "as a matter of fact, practicality and law . . . was simply not within the control of the defendants at the time of arrest" (*Id.*, 56a) and the "breaking into the suitcases" could not be justified as a routine "inventory search" (*Id.*, 58a-59a).[6]

Stage 3: On appeal the government switched again with respect to the footlocker. It argued that the search incident exception, as articulated in *Chimel*, did not apply to this case; rather, because the arrest occurred outside of a dwelling, the legality of this particular warrantless "search incident" should be tested by a standard of "reasonableness" (Pet. App. 11a-12a).[7] The court of appeals, noting that the *Chimel*

[6] Doubtless because of the physical proximity of the suitcases and the footlocker at the time of arrest, the district court also made an additional finding that the "search-incident exception" could not save the suitcase searches; the court found that, as with the footlocker, "there was no showing that, at the time of arrest, the suitcases were within the immediate possession or control of any of the defendants" (Pet. App. 57a-58a). This finding was specifically affirmed by the court of appeals (*Id.*, 20a).

[7] The government also argued alternatively that, in any event, the footlocker was within defendants' control at the time of arrest under *Chimel* v. *California*, 395 U.S. 752 (1969)) (Pet. App. 11a).

formulation, like the Fourth Amendment itself, is not limited by rationale or precedent to arrests occurring inside houses, held the *Chimel* test to be eminently relevant (*Id.*, 12a) and held further that "applying *Chimel*, we find no error in the lower court's decision that the footlocker was not in an area within the arrestee's immediate control" (*Id.*, 13a, see 15a).

After disposing of the footlocker issue by this holding, the court of appeals noted: "While . . . we understand the government to be relying on the search-incident-to-arrest exception, part of its argument *suggests* that it may also be looking in the direction of liberalized luggage search rules . . . " (emphasis added) (Pet. App. 16a). The court of appeals then went on to discuss, in *dictum* its view that baggage does not constitute a category exempt from the warrant requirement (*Id.*, 16a-18a). The court also added in accord with the district court's decision, that "there was no special exigency justifying a warrantless search under the circumstances of this case" (Pet. App. 19a).

Stage 4: In its petition for a writ of certiorari the government has presented yet another theory to justify the neglect of the law enforcement officers to obtain a warrant before searching the footlocker. Now the government argues that there was never any need for the officers to secure a warrant to search the footlocker believed to contain contraband because a warrantless search of luggage seized outside a suspect's private premises should *not be treated as "presumptively unreasonable"* (Pet. at 8) (emphasis added). As will be demonstrated below, this position calls for the formulation of a new, unprecedented exception to the warrant requirement.

Reasons for Not Granting the Writ.

This Court should not grant the writ because (1) the government seeks certiorari on an issue never properly crystallized or

directly ruled upon below and further muddied by a confusing and fragmented record; and (2) the new theory now advanced by the government would constitute a drastic curtailment of the Fourth Amendment which finds no support in any decisions of this Court, and in any event would be wholly unsupported on the factual record of this case.

(1) This is not an appropriate case in which to consider formulating a new *per se* rule validating all warrantless searches of luggage on probable cause. Because of the government's shifting stance throughout the prior proceedings, the theory now advanced by the government was never properly presented or addressed below and neither lower court based its decision on a *rejection* of it. While the court of appeals noted that "part of [the government's] argument [on appeal] *suggests* that it may also be *looking in the direction* of liberalized luggage searches" (Pet. App. 16a, emphasis added), that court expressly stated: "we understand the Government to be relying on the search-incident-to-arrest exception" (*Id.*) and it was on that basis that the court decided the merits of the footlocker search.[8] (See *Id.*, 11a-15a). So too the district court decided the case on grounds different from that now raised by the government. The government in effect asks this Court to depart from tradition and to review an issue framed in the first instance in a petition for certiorari, without the benefit of a crystallized record to inform the Court. See *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring). Also see Bickel, Alexander M., Foreword: The Passive Virtues, The Supreme Court, 1960 Term, 75 Harv. L. Rev. 40 (1961).

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[8] The court of appeals' discussion (Pet. App. 16a-18a) of the possibility of a new rule for luggage — in which it rejects that result — is, in effect, *dictum* and cannot be said to provide a proper foundation for a writ of certiorari to be granted on this issue.

Moreover, the government's current stance chops up the case in a fashion which is neither logical nor factually defensible. While seeking certiorari on a theory that luggage, lawfully in the custody of government agents, especially after an arrest, may be searched without a warrant (see Pet. 16), the government applies that theory to the footlocker but omits the two suitcases from its reach. Yet, as both lower courts found, just minutes before this arrest Machado and Leary had taken possession of the two suitcases as well as the footlocker (Pet. App. 3a, 35a), and at the time of defendants' arrest at least one of the suitcases was located in the trunk of the car with the footlocker and the other was within Leary's reach (see *id.*, 4a, 57a). Since the agents plainly had probable cause to arrest Machado as a drug trafficker believed to be shipping marijuana across country,[9] there is no reason for the government to seek to apply its proposed new luggage exception to one portion of Machado's luggage but not to the other. This is particularly so since the government attempts to support its argument for certiorari by pointing to respondents' "diminished" privacy interest in their "personal effects" after a lawful arrest (Pet. 17-18). Since Machado's suitcases were no less "personal effects" than the footlocker — and, indeed, because of their "size, accessability and portability," may be likened more to the "personal effects" found on an arrestee's person than could the large, unwieldy and double-locked footlocker (see Pet. App. 14a-15a) — any luggage exception to the warrant requirement for Machado's footlocker should certainly apply to the suitcases as well.

The evident inconsistencies between the government's treatment of the footlocker, on the one hand, and the two

[9] Machado never contested the lawfulness of his arrest and the court of appeals noted that it had "no doubt that the agents had probable cause to arrest him" (*Id.*, 10a, n. 2).

suitcases, on the other, underscore the confusions in theory which have characterized the government's arguments throughout this case.[10] To grant certiorari on such a record would be to reach out to decide a controversial and difficult constitutional issue in a factual and legal setting that does not call for its resolution by this Court.

(2) The theory advanced by the government at this stage is, in any event, ill-conceived. The essence of the government's position is that a new rule should be carved out for searches of luggage believed to contain contraband: from now on such searches "conducted *outside the judicial process*, without prior approval by judge or magistrate" (see *Katz* v. *United States*, 389 U.S. 347, 357 (1967)), are to be deemed *per se reasonable* under the Fourth Amendment — without regard to whether the "search-incident exception" applies[11] or

[10] A further confusion at this current stage results from the fact that the government is not seeking certiorari on the issue of Chadwick's arrest, which was ruled invalid below. The government notes at one point that one of its arguments — that "[r]espondents' privacy interest in their personal effects was further diminished by the fact that they were under lawful arrest at the time of the search" (Pet. at 18) — "does not apply to respondent Chadwick if the court of appeals was correct in concluding that his arrest lacked probable cause." *Id.*, at n. 12. By this statement the government appears to suggest that it believes that the *other* arguments which it asserts in its petition *do* apply to Chadwick. This would be an absurd result since, in finding that there was no probable cause to arrest Chadwick, both lower courts found that Chadwick had a "possessory interest [in the luggage] so slight that one [could] not fairly infer knowledge of the contents from that fact" (Pet. App. 25a; see 40a-43a).

[11] The government apparently concedes the findings of both lower courts that the footlocker was not within the immediate control of respondents at the time of their arrest (see Pet. 5, n. 2, where the government expressly states that the suitcases, which were in virtually the same place as the footlocker, were not within respondents' immediate control). Accordingly, the government does not attempt to tie its theory of a luggage exception to an incident-to-arrest situation. It does, however, argue that, when an arrest has occurred, the agents should have even greater freedom to search the arrestee's luggage — apparently wherever it is found — without the burden of being obliged to seek a warrant. See Pet. 16-18.

whether exigent circumstances compel swift police action — as long as they take place *outside the suspect's home or office* (see Pet. 8, 10, 13, 16). This position turns the Fourth Amendment on its head; it transforms "the most basic constitutional rule in this area" — that a warrant *must* be obtained unless one of the "few specifically established and well-delineated exceptions" applies (*Katz* v. *United States, supra,* at 357) — into the exception.[12]

The wrongheadedness of this result is the product of the three wrongheaded steps upon which it is built. The government contends (1) that "there is no support in the history or language of the Fourth Amendment for the view that every search or seizure — regardless of the nature of the privacy interest at stake — is presumptively invalid where a warrant could have been but was not obtained" (Pet. 12-13); (2) that "whether a search or seizure without a warrant should be deemed presumptively unreasonable depends on a determination whether the privacy interest at stake is of such magnitude that the interposition of a neutral and detached magistrate should be required to make the probable cause determination" (Pet. 13); and (3) that "footlockers and other items of portable personal property" are subject to the same "diminished expectation of privacy" as are automobiles (and as well are movable) and therefore an analogue to the automobile exception should apply (Pet. 13-14).

The first contention, that history does not support the presumptive invalidity of all warrantless searches, is simply inaccurate. The Fourth Amendment was drafted and adopted in a context in which *no* search and seizure took place lawfully

[12] Under the government's proposed new rule a warrant would be necessary only in that narrow class of cases in which police breach the confines of a home or office without the justification of consent, "plain view," "incident to arrest," "hot pursuit," or other "emergency situations." See *United States* v. *Mapp,* 476 F. 2d 67, 76 (2d Cir. 1973). Whether the warrant requirement would survive at all is questionable.

without *some* form of warrant or writ. See Lasson, Nelson B., *The History and Development of the Fourth Amendment to the United States Constitution* (1937), at 54-55, 100-103; Schwartz, Bernard, *The Bill of Rights: A Documentary History,* vol. 1, part 3, "Revolutionary Declarations and Constitutions, The Rights of the Colonists and a List of Infringements and Violations of Rights (1772)," at 205-206. Indeed, it was settled at common law that a search and seizure, even of contraband, could not be made without a warrant except if expressly authorized by statute. *In re Swan,* 150 U.S. 637, 650 (1893). Thus Chief Justice Shaw of the Supreme Judicial Court of Massachusetts said:

> The authority to seize liquors without a warrant, though sometimes necessary, is a high power; and, being in derogation of common law right, it is to be exercised only where it is clearly authorized by the statute or rule of law which warrants it. *Kennedy* v. *Favor,* 14 Gray, 200, 202 (1859), quoted in *In re Swan, supra,* at 649.

To be sure, the warrants or writs which were used in colonial times to authorize searches and seizures were often general "writs of assistance" which did not specify with particularity the object of the search; but nonetheless no search and seizure — including searches and seizures of boxes, trunks, chests and other receptacles aboard ships in the harbor, suspected of containing contraband — could take place lawfully except by warrant. See Schwartz, *supra*; Lasson, *supra.* The Fourth Amendment was in fact designed not to impose a warrant requirement where none had existed before, but rather to regulate the proper *form* of the warrant and to ensure *more protection* than a general warrant alone had been

able to provide. *Id.* Accordingly, contrary to the government's claim, the history of the Fourth Amendment does indeed support the view that "every search and seizure — regardless of the nature of the privacy interest at stake — is presumptively invalid where a warrant could have been but was not obtained."[13]

The government's second contention concerning the "magnitude" of "the privacy interest at stake" misses the essential point of the warrant requirement. Just two weeks ago, on July 6, 1976, while considering whether a non-investigatory automobile search was "reasonable" under the Fourth Amendment; this Court had occasion to discuss the basis for the Fourth Amendment's requirement of a warrant, over and above its requirement of "reasonableness." *South Dakota* v. *Opperman*, ___ U.S. ___, ___, 44 L.W. 5294, 5295, n. 5. The Court did not suggest in any way that the warrant requirement depended upon a certain "magnitude" of the "privacy interest at stake"; rather, the Court reaffirmed in the context of automobiles — which concededly allow a "lesser expectation of privacy" than do homes and offices — a long-established understanding that the warrant requirement "depends" upon the need to protect the citizen against a hasty, ill-founded determination of "probable case":

> We have frequently observed that *the warrant requirement assures that legal inferences and conclusions as to probable cause will be drawn by a neutral magistrate* unrelated to the criminal investigative-enforcement process. *Id.* (Emphasis added.)

[13] As this Court recently noted, the Fourth Amendment "was primarily a reaction to the evils associated with *the use of the general warrant* in England and *the writs of assistance* in the Colonies. . . ." *Stone, Warden* v. *Powell*, ___ U.S. ___, ___, 44 L.W. 5313, 5318 (July 6, 1976).

In his concurring opinion Mr. Justice Powell amplified this same point:

> In the criminal context the requirement of a warrant protects the individual's legitimate expectation of privacy against the overzealous police officer. "Its protection consists in requiring that those inferences [concerning probable cause] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U.S. 10, 14 (1948). See, e.g., *United States* v. *United States District Court*, [407 U.S. 297, 316-318 (1972)]. . . . A related purpose of the warrant requirement is to prevent hindsight from affecting the evaluation of the reasonableness of a search. See *United States* v. *Martinez-Fuerte*, ___ U.S. ___, ___ (1976); cf. *United States* v. *Watson*, ___ U.S. ___, ___, n. 22 (1976). 44 L.W. at 5299.

See also *United States* v. *Martinez-Fuerte*, ___ U.S. ___, 44 L.W., 5336, 5342 (July 6, 1976).

The government's single-minded focus on the "magnitude" of the privacy interest makes no provision for these critical protective aspects of the warrant requirement. Indeed, its proposed new rule could have wide-ranging and devastating implications: a citizen could no longer carry personal belongings outside of the home or office in any kind of container or carrying case, even if locked and even if carried with the intent of transporting them to other warrant-protected premises, without risking exposure of those belongings to suspicious, prying — and uncontrolled — eyes of government officials.

The government's third contention mistakenly equates luggage and automobiles without taking into account the relevant and substantial *differences* between the two. Those differences are underscored by this Court's explanation in *South Dakota* v. *Opperman*, *supra*, as to the basis for the lesser expectation of privacy in an automobile than in a private residence or office:

> Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order.
>
> The expectation of privacy as to autos is further diminished by the obviously public nature of automobile travel. Only two Terms ago, the Court noted:
>
> "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and *it seldom serves as one's residence or as the repository of personal effects*. It travels public thoroughfares where both its occupants and its contents are in plain view." *Cardwell* v. *Lewis*, 417 U.S. [583, 590 (1974)]. (Emphasis added).

In the interests of public safety and as part of what the Court has called "community caretaking functions," *Cady* v. *Dombrowski*, [413 U.S. 433, 441 (1973)], automobiles are frequently taken into police custody. Vehicle accidents present one such occasion. To permit the uninterrupted flow of traffic and in some circumstances to preserve evidence, disabled or damaged vehicles will often be

> removed from the highways or streets at the behest of police engaged solely in caretaking and traffic-control activities. Police will also frequently remove and impound automobiles which violate parking ordinances and which thereby jeopardize both the public safety and the efficient movement of vehicular traffic. The authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge.[14] 44 L.W. at 5295.

Luggage, unlike the automobile, is not "subjected to pervasive and continuing regulation and controls, including periodic inspection and licensing requirements."[15] Nor are pieces of luggage "frequently taken into police custody" for "public safety" purposes. Moreover, luggage, unlike the automobile, is precisely intended to be a *"repository of personal effects"*; and although luggage may "travel" in the

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[14] In his concurring opinion Mr. Justice Powell does point out that, in any event, "privacy" is not entirely eliminated even in the context of automobiles.

> Although the expectation of privacy in an automobile is significantly less than the traditional expectation of privacy associated with the home, *United States* v. *Martinez-Fuerte*, *supra*, at ____; *United States* v. *Ortiz*, [422 U.S. 891, 896, n. 2 (1975)]; see *Cardwell* v. *Lewis*, 417 U.S. 583, 590-591 (1974) (plurality opinion), the unrestrained search of an automobile and its contents would constitute a serious intrusion upon the privacy of the individual in many circumstances. 44 L.W. at 5298; see also *id.*, 5297, n. 1.

[15] Even when luggage is inspected as a condition to boarding an aircraft, that inspection is generally confined to a minimally intrusive technique, such as use of a magnetometer to detect the presence of lethal weapons or explosives, and does not involve opening luggage for visual inspection unless the magnetometer indicates the necessity for doing so. See, *e.g.*, *United States* v. *Albarado*, 495 F. 2d 799 (2d Cir. 1974).

sense that others transport or move it on public thoroughfares, rarely if ever are its contents intentionally exposed to "plain view."[16] Here, of course, the luggage at issue was opaque and securely locked; no waiver of privacy or forfeiture of Fourth Amendment rights can be inferred. See *United States* v. *Kim*, ____ F. Supp. ____, 45 L.W. 2014, 2015 (U.S. Dist. Ct., Haw., June 9, 1976).

Finally, in addition to the theoretical confusions and misconceptions in the government's current legal position, key fact findings in this case warrant denial of the writ. Both lower courts found that "the footlocker was not an area within the arrestee's immediate control" (Pet. App. at 13a; see 56a) and "no special exigency [existed] justifying a warrantless search under the circumstances" (*Id.*, 19a; see 50a-51a). Yet virtually all of the decisions cited by the government as upholding luggage searches (see Pet. at 10-12, notes 4-8) relied upon either the "search-incident exception" or a determination that exigent circumstances existed.[17] Also, almost all of these cases

[16] In *South Dakota* v. *Opperman* the one part of the car not opened and inspected in the course of the approved "inventory search" — the locked trunk — was precisely that part of an automobile whose contents are not typically exposed to "plain view" and which is not "a customary place for documents of ownership and registration" as is the glove compartment. See 44 L.W. at 5296.

[17] The following cases upheld luggage searches on a "search incident" theory: *United States* v. *Battle*, 510 F. 2d 776 (D.C. Cir. 1975); *United States* v. *Kaye*, 492 F. 2d 744 (6th Cir. 1974); *United States* v. *Ciotti*, 469 F. 2d 1204 (3d Cir. 1972), vacated on other grounds, 414 U.S. 1151 (1974); *United States* v. *Maynard*, 439 F. 2d 1086 (9th Cir. 1971); *United States* v. *Mehciz*, 437 F. 2d 145 (9th Cir. 1971) (although the text of this opinion does not make clear the basis for its result, the same court of appeals in the later case of *United States* v. *Maynard*, *supra*, stated that in *Mehciz* "we upheld a warrantless search of a suitcase incident to the lawful arrest of its carrier," 439 F. 2d at 1087); *United States* v. *Buckhanon*, 505 F. 2d 1079 (8th Cir. 1974) (here the court stated that it was relying on the reasoning of *Mehciz*, 505 F. 2d at 1082); *United States ex rel. Muhammad* v. *Mancusi*, 432 F. 2d 1046 (2d Cir. 1970), cert. denied, 402 U.S. 911 (1971); *United States* v. *Robbins*, 424 F. 2d 57 (6th Cir. 1970); *United States* v. *Eatherton*, 519 F. 2d 603 (1st Cir. 1975). All of these cases but two involved situations where the item searched was a suitcase (or in one case a shopping bag) being carried in hand at the time of arrest; the two exceptions, *United States* v. *Ciotti* and *United States* v. *Robbins*, involved suitcases seized from motel rooms within the scope of *Chimel*.

See also *United States* v. *Soriano*, 497 F. 2d 147 (5th Cir. en banc 1974) (in which court upheld luggage search as *part* of an automobile search but suggested that the search-incident exception would likely have been applicable had the government relied upon the theory).

The following cases upheld luggage searches on an exigent circumstances theory: *United States* v. *Valen*, 479 F. 2d 467 (3d Cir. 1973), cert. denied, 419 U.S. 901 (1974); *United States* v. *Johnson*, 467 F. 2d 630 (2d Cir. 1972), cert. denied sub nom. *White* v. *United States*, 410 U.S. 932 (1973); *People* v. *McKinnon*, 7 Cal. 3d 899, 500 P. 2d 1097 (1972); *Waugh* v. *State*, 20 Md. App. 682, 318 A. 2d 204 (1974), reversed on other grounds, 275 Md. 22, 338 A. 2d 268 (1975); *Chaires* v. *State*, 480 S.W. 2d 196 (Ct. Crim. App. Texas, 1972); *State* v. *Wolfe*, 5 Wash. App. 153, 486 P. 2d 1143 (1971). See also *United States* v. *Wilson*, 524 F. 2d 595 (8th Cir. 1975), cert. denied, No. 75-5884, March 1, 1976 (in which the court relied on "plain view" rationale since the barrel of a shotgun was showing, but suggested in *dictum* that the exigency rationale of the "automobile exception" would also be applicable). These cases also all involved suitcases or similarly sized objects.

involved searches of small, easily portable suitcases or containers — not a 200-pound double-locked footlocker which could not be opened without keys nor moved without the help of two or three men (see cases, note 17, *supra*). Indeed, it is the two small suitcases in this case — with respect to which the government does *not* seek certiorari — which, because of their ease of access and ready portability (see Pet. App. 14a-15a), come closer to fitting within the search-incident and exigent-circumstances decisions relied upon by the government. Accordingly, the government seeks certiorari on a factual record which departs significantly from those of other cases in which courts have upheld warrantless luggage searches.

Conclusion.

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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